

REMARKS

Applicants respectfully request reconsideration of the present application in view of the reasons that follow. Claims 41, 42, 45-50, 53-58 and 61-75 are pending in the present application.

I. Rejection of Claims Under 35 U.S.C. § 102(b)

In Section 4 of the Office Action, Claims 41, 42, 45, 46, 49, 50, 53, 54, 57, 58, and 61-75 were rejected under 35 U.S.C. 102(b) as being anticipated by "On Design Criteria and Construction of Non-coherent Space-Time Constellations" by Borran et al. (Borran). Applicants respectfully traverse the rejection because Borran is not prior art to the present application under 35 U.S.C. 102(b).

The Examiner cites a publication date of Borran of October 22, 2001. As evidence of this publication date, the Examiner provides a printout of a directory including links to documents. Specifically, the Examiner provides a printout of <http://www.ece.rice.edu/~ashu/publications/> with a date of 22-Oct-2001 associated with a document titled BSAJ02.pdf. The Examiner further provides an indication that the selection of the document titled BSAJ02.pdf causes presentation of Borran. Applicants have accessed the document titled BSAJ02.pdf based on this information. However, Applicants respectfully submit that the indicated date is not a "publication" date or a date the document was "publicly posted".

With emphasis added through underlining, M.P.E.P. § 2128 states:

An electronic publication, including an on-line database or Internet publication, is considered to be a "printed publication" within the meaning of 35 U.S.C. 102(a) and (b) provided the publication was accessible to persons concerned with the art to which the document relates. See *In re Wyer*, 655 F.2d 221, 227, 210 USPQ 790, 795 (CCPA 1981) ("Accordingly, whether information is printed, handwritten, or on microfilm or a magnetic disc or tape, etc., the one who wishes to characterize the information, in whatever form it may be, as a 'printed publication' * * * should produce sufficient proof of its dissemination or that it has otherwise been available and

accessible to persons concerned with the art to which the document relates and thus most likely to avail themselves of its contents." (citations omitted).).

With emphasis added through underlining, M.P.E.P. § 2128 further states:

Prior art disclosures on the Internet or on an on-line database are considered to be publicly available as of the date the item was publicly posted. *>Absent evidence of the date that the disclosure was publicly posted, if< the publication >itself< does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C. 102(a) or (b)

There is no indication that the printout provided by the Examiner indicates a date that the document was "publicly posted" or was otherwise made accessible to persons concerned with the art to which the document relates. The date of 22-Oct-2001 indicates the date the document was last modified on the server on which the document was saved. However, such a date fails to indicate that the document was "publicly posted" because the document was only "publicly posted" if it was publicly accessible. The Federal Circuit recently reiterated that

"Because there are many ways in which a reference may be disseminated to the interested public, 'public accessibility' has been called the touchstone in determining whether a reference constitutes a 'printed publication' bar under 35 U.S.C. § 102(b). " In re Hall, 781 F.2d 897, 898-99 (Fed. Cir. 1986) (emphasis added). "A given reference is 'publicly accessible' upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it." Bruckelmyer v. Ground Heaters, Inc., 445 F.3d 1374, 1378 (Fed. Cir. 2006).

SRI Int'l, Inc. v. Internet Sec. Sys., Inc., No. 07-1065, at *13-14 (Fed. Cir. 2008)(www.ca9.uscourts.gov). In *SRI Int'l*, the Federal Circuit stated that "an unpublicized paper with an acronym file name posted on an FTP server resembles a poster at an unpublicized conference without a conference index of the location of the various poster presentations." *Id.* at *20.

The Examiner provides no explanation of how the directory was identified or located. Applicants have been unable to determine how the document, BSAJ02.pdf, can be reached from the uniform resource locator (URL), <http://www.ece.rice.edu> or from <http://www.ece.rice.edu/~ashu/>, which are the directories higher in the directory structure. To access the URL, <http://www.ece.rice.edu/~ashu/publications>, the individual must already know of the existence of the URL. Such a requirement indicates that BSAJ02.pdf is not “publicly posted” now, and further, was not “publicly posted” on 22-Oct-2001.

Selection of the “Parent.Directory” link from <http://www.ece.rice.edu/~ashu/publications> causes presentation of <http://www.ece.rice.edu/~ashu/>. Again, however, Applicants have been unable to determine how the document, BSAJ02.pdf, can be reached from <http://www.ece.rice.edu/~ashu/>. Thus, there appears to be no mechanism for navigating to <http://www.ece.rice.edu/~ashu/publications> unless the full URL is known.

Though the directory now appears to be accessible using the hypertext transfer protocol (http) if the full uniform resource locator is known, the structure of the directory indicates that the directory was originally accessible using the file transfer protocol (ftp). The directory includes a list of documents without any indication of the subject matter of the documents. There is no ReadMe file or other indication what any of the files contain. The only file with a descriptive name, IT2004_jaber_partially_coherent.pdf, was last modified 28-Aug-2004 and when selected shows a date of March 18, 2004. Thus, there is no indication that the subject matter of the documents in the directory is identifiable unless the subject matter is already known to the person accessing the directory. The only explanation for the filename BSAJ02.pdf identifiable by Applicants is that BSAJ indicates the last names of the authors and inventors of the present application, Borran, Sabharwal, Aazhang, and Johnson. The designation “02” may represent a year. Therefore, “[a]bsent evidence of the date that the disclosure was publicly posted, if< the publication >itself< does not include a publication date (or retrieval date), it cannot be relied upon as prior art under 35 U.S.C. 102(a) or (b).” M.P.E.P. § 2128.

Finally, even if a link from www.ece.rice.edu to BSAJ02.pdf now exists, there is no indication that such a link existed on 22-Oct-2001. Therefore, Applicants respectfully submit that the evidence presented by the Examiner asserting a publication date for Borran of October 22, 2001 is to “an unpublicized paper with an acronym file name posted on an FTP server [which] resembles a poster at an unpublicized conference without a conference index of the location of the various poster presentations.” *Id.* at *20. Thus, the document identified by the Examiner was not publicly accessible nor was it publicly posted.

Further, when Applicants select the link “Journal Articles” from <http://www.ece.rice.edu/~ashu/>, the enclosed exhibit A is identified which shows M. J. Borran, A. Sabharwal and B. Aazhang, On Design Criteria and Construction of Noncoherent Space-time Constellations, IEEE Transactions on Information Theory, pp. 2332–2351, 49(10), October 2003 and provides a link to a differently formatted version of the paper. Still further, the enclosed exhibit B shows a publication date for Borran of October 2003. Applicants have further identified additional references to Borran that consistently show a publication date for Borran of October 2003. Therefore, Applicants respectfully submit that Borran was actually published on October 2003 as indicated in exhibits A and B.

The present application has a filing date of September 24, 2003, and claims priority to Provisional Application No. 60/474,476, which was filed May 30, 2003. As a result, Borran, with a publication date of October 2003, is not prior art to the present application under 35 U.S.C. 102(b) or 35 U.S.C. 102(a). Therefore, Applicants respectfully request withdrawal of the rejection of Claims 41, 42, 45, 46, 49, 50, 53, 54, 57, 58, and 61-75 under 35 U.S.C. 102(b).

II. Rejection of Claims 47, 48, 55, and 56 Under 35 U.S.C. § 103(a)

In Section 5 of the Office Action, Claims 47, 48, 55, and 56 were rejected under 35 U.S.C. 102(b) as being anticipated by Borran in view of U.S. Patent 7,269,436 to Won (Won). As discussed in Section I., Applicants respectfully submit that Borran is not prior art to the present application under 35 U.S.C. 102(b). Applicants respectfully traverse the

rejection because Won fails to teach, suggest, or disclose all of the elements of Claims 47, 48, 55, and 56, which depend from one of Claims 41 and 49.

Independent Claims 41 and 49 recite in part:

selecting a signal constellation from a plurality of signal constellations based on the determined characteristic, the selected signal constellation including a plurality of constellation points, the plurality of constellation points selected by maximizing a minimum Kullback-Leibler distance between the plurality of constellation points;

Won describes a “method and apparatus for allocating a power in a multiple-input multiple-output communication system.” (Abstract) Won teaches nothing whatsoever about selecting constellation points or maximization of any distance between the plurality of constellation points. As a result, Won fails to teach, suggest, or describe all of the elements of Claims 41 and 49.

An obviousness rejection cannot be properly maintained where the reference used in the rejection does not disclose all of the recited claim elements. As a result, Applicants respectfully request withdrawal of the rejection of 47, 48, 55, and 56, which depend from one of Claims 41 and 49.

Applicants believe that the present application is in condition for allowance. Favorable reconsideration of the application as amended is respectfully requested.

The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

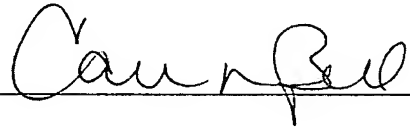
The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by a check or credit card payment form being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for

such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

Date January 18, 2008

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By _____

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